ABRIC PROJECT MANAGEMENT SDN BHD

v.

PALMSHINE PLAZA SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
RAMLY ALI J
[COMPANIES (WINDING UP) NO: D5-28-311-1999]
26 OCTOBER 2004

COMPANY LAW: *Winding-up - Liquidator - Application by contributory of company in liquidation against liquidator's decision not to commence proceedings for breach of contract - Institution of proceedings in name of company in liquidation - Principles applicable - Companies Act 1965, s. 279*

This was an application pursuant to s. 279 of the Companies Act 1965 ('the Act') by the applicant, a contributory of the respondent company, being aggrieved with the decision of the liquidator in refusing to bring an action against one Hong Leong Bank Malaysia Bhd ('HSBC') on behalf of the respondent for breach of contract, for: (i) an order pursuant to s. 279 of the Act that the decision of the liquidator of not commencing proceedings against HSBC be reversed or set aside; and (ii) an order that the liquidator be directed to commence proceedings against HSBC, or alternatively, the liquidator to authorise the applicant to commence proceedings against HSBC on such terms as the court deems fit.

The applicant sought an action to be brought by the respondent against HSBC for an alleged breach of contract ('the proposed proceedings'). He alleged that the respondent and HSBC were purportedly jointly acting together to perform a contract to develop and construct office space on a piece of land whereupon HSBC had confirmed its acceptance of the respondent's offer to sell 147,958 net square feet of office space with 240 car parks at a price of RM83,500,000. The applicant thereafter averred that HSBC had terminated this development contract by inference of its conduct of joining in support of the petitioner's winding-up petition against the respondent. The liquidator maintained that he was not averse to the applicant obtaining sanction or leave from the court to use the name of the respondent to initiate the proposed proceedings subject to the following terms and conditions: (a) that an amount of security and indemnity be

provided; and (b) that the court assess the proposed proceedings and, if satisfied, sanction the applicant's use of the respondent's name to initiate the proposed proceedings. The applicant and liquidator, however, could not agree to the said terms and conditions.

Held:

[1] When determining whether to give leave to a creditor or contributory to institute proceedings in the name of a company in liquidation, the court should apply the same principles as in an application to institute proceedings against the company in liquidation. Those principles required the applicant to produce evidence that is sufficient to establish that its claim had a solid foundation and that it gives rise to a serious question to be tried. The applicant was not required, at that stage, to produce evidence sufficient to establish affirmatively that the proposed proceedings would necessarily be successful. (p 417 e-f)

[2] In the present case, the court was satisfied that the evidence adduced by the applicant *via* his affidavits in support of the application and exhibits attached thereto, established that the respondent had a sufficiently good cause of action for breach of contract against HSBC. At the least, the applicant had established that there were serious questions to be tried as between the respondent and HSBC; thus, the proposed claim was neither vexatious nor oppressive. Based on the facts of the present case and the established law on the issues as well as the power of the court under s. 279 of the Act, the applicant had made out a case under the present application. The court, therefore, made an order that the applicant was authorised to commence proceedings by himself against HSBC in the name of the respondent in respect of the proposed proceedings subject to certain terms and conditions contained in the said order. (pp 418 d & 419 f-g)

[Ordered accordingly.]

Case(s) referred to:

Aliprandi v. Griffith Vintners Pty Ltd (in liquidation) & Anor [1991] 6 ACSR 250 ***(foll)***

Eros Cinema Pty Ltd v. Michael Assad Nassar [1996] 14 ACLC 1374 ***(foll)***

Fargro Ltd v. Godproy & Ors [1986] 3 All ER 279 ***(foll)***

Owen v. Bull [1936] 4 DLR 273

Russel & Anor v. Westpac Banking Corporation & Ors [1994] 12 ACLC 278 ***(foll)***

Vagrand Pty Ltd v. Fielding [1993] 11 ACLC 411 ***(foll)***

Yates v. City Loan & Credit Corp Pty Ltd [1988] 6 ACLC 219

Legislation referred to:
Companies Act 1965, s. 279

Other source(s) referred to:
Andrew R Keny, *McPherson on The Law of Company Liquidation,* 4th edn, p 258

For the applicant - Dennis Xavier; M/s Xavier, Norhaslinda & Assoc
For the liquidator - Gregory Ling Lee Yi; M/s Ranjit Ooi & Robert Low

Reported by Suresh Nathan

JUDGMENT

Ramly Ali J:
Enclosure 19 is an application pursuant to s. 279 of the Companies Act 1965 by the applicant, a contributory of the respondent company, being aggrieved by the decision of the liquidator, Mr. Lim Thin Huat in refusing to bring an action against Hong Leong Bank Malaysia Bhd (HSBC) on behalf of the respondent company for breach of contract.

The applicant has sought, through the filing of the application, for, *inter alia*:

(i) an order pursuant to s. 279 of the Companies Act 1965 that the act or decision of the liquidator in not commencing proceedings against HSBC be reversed or set aside; and

(ii) an order that the liquidator be directed to commence proceedings against HSBC or alternatively, the liquidator to authorise the applicant to commence proceedings against HSBC on such terms as the court deems fit.

The applicant sought that an action be brought by the respondent against HSBC for an alleged breach of contract (proposed proceedings). The crux of the applicant's proposed proceedings is set out in paras. 13 to 21 of the applicant's first affidavit. From what the applicant has provided for the proposed proceedings, it appears that the respondent and HSBC were purportedly jointly acting together to perform a contract to develop and construct office space on a piece of land whereupon HSBC had confirmed its acceptance of the respondent's offer to sell to HSBC, 147,958 net square feet of office space with 240 car parks at a price of RM83,500,000. The applicant thereafter alleged that HSBC had terminated this development

contract, inferred from it's conduct of joining in support of the petitioner's winding-up petition against the respondent company. In the applicant's former solicitors letter dated 2 December 2003 the proposed proceedings were stated as proceedings "against Hong Kong Bhd (HSBC) to recover damages which would be beneficial to the company, its creditors and contributions."

The applicant is a contributory in the respondent company holding 50% of the paid-up capital. He is also a director in the respondent company. In his affidavit in support of the application, the applicant says that the respondent company has a good cause of action against HSBC. He is alleging that the decision of the liquidator not to pursue with a claim against HSBC is not in the interest of the respondent company and/or the contributors and/or its creditors. The applicant also alleged that the decision appeared to benefit HSBC at whose instance the liquidator was appointed.

The Liquidator's Petition Vis-a-vis The Application

At all material times, the liquidator has kept an open mind to the applicant's proposed proceedings and to the possibility of commencing such an action in the name of the respondent company. The applicant first posed his intention that the proposed proceedings be commenced *via* a letter dated 18 September 2003 from the applicant's former solicitors, addressed to the liquidator. A meeting was called by the liquidator on 22 October 2003 and attended by the applicant and discussion, *inter alia*, pertained to the possibility that sanction may be given to the applicant to use the name of the respondent company to initiate the proposed proceedings. However, after obtaining legal advice, the liquidator caused the issuance of another letter through his solicitors, informing the applicant that the liquidator was "unable, as a matter of law, to sanction the commencement of the action." Consequently the applicant then sought that the liquidator himself proceed with the proposed proceedings *via* the letter dated 2 December 2003 from the applicant's former solicitors. Thereafter, as the liquidator was still deliberating and obtaining advice on the matter, further extensions were sought but no decision was made as to whether the liquidator himself would initiate the proceedings. In the mean time, this application was filed and fixed for hearing on 16 July 2004.

Nevertheless, another meeting between the applicant and the liquidator was held on 22 July 2004 as evidenced by the liquidator's solicitors letter dated 5 August 2004. It was at this juncture that the liquidator confirmed that he would not be initiating the proposed proceedings. The liquidator cited high costs and expenses, which the respondent company could not afford owing to its current financial state and the fact that the liquidator is in his final stage of concluding the respondent's liquidation as reasons as to why he had decided not to proceed with the proposed proceeding. The liquidator claimed that it would not be in the interests of the respondent, its creditors and contributories to engage in protracted litigation, which may take a considerable amount of time, delaying the completion of the liquidation process and in doing so, incurring further costs and expenses.

Despite that the liquidator maintained the position that he was not adverse to the applicant obtaining sanction or leave from the court, to use the name of the respondent company to initiate the proposed proceedings subject to certain terms and conditions. In a nutshell, the liquidator sought the following terms and conditions:

(i) that an amount of security and indemnity be provided; and

(ii) that the court assess the proposed proceedings and if satisfied, sanction or give leave to the applicant to use the respondent's name to initiate the proposed proceedings.

However, the applicant and the liquidator could not agree to the terms and conditions as the applicant had sought certain modifications, which amounted to a major departure from the terms and conditions fixed by the liquidator. Apparently, the parties could not agree on the following issues:

(i) that a sum of RM100,000 is to be deposited into a joint account of both solicitors of the applicant and liquidator;

(ii) the definition of "proposed proceedings" in the letter dated 5 August 2004 is to include "all proceedings and causes of actions arising out of the project and or transaction including and not limited to HSBC"; and

(iii) upon the transaction of the terms referred to in the letter dated 5 August 2004 incorporating those modifications, "the liquidator is to consent to the application rather than it be left to court to decide."

The Liquidator's Role In A Compulsory Liquidation

It is trite that upon the compulsory liquidation of a company, the appointed liquidator displaces the directors of the company and the control of the activities of the company are then vested with the liquidator. Following therefrom when the company is in liquidation, the control as to whether an action should or should not be initiated by the company is also vested in the liquidator.

(see: *Russel & Anor v. Westpac Banking Corporation & Ors* [1994] 12 ACLC 278; *Yates v. City Loan & Credit Corp. Pty. Ltd.* [1988] 6 ACLC 219).

Accordingly, if a contributory of the company is of the opinion that there is a valid cause of action available to the company for which a suit or action ought to be brought in the name of the company that contributory must place this before the liquidator for his consideration. If for whatever reason, the liquidator is unwilling to initiate the action in the name of the company, it is still available to that contributory to apply to the court under s. 279 of the Companies Act 1965 seeking an order that the liquidator be compelled to initiate the action in the name of the company or that leave be given to the contributory himself to bring the action in the name of the company. Section 279 of the Companies Act 1965 provides as follows:

> 279. Appeal against decision of Liquidator
>
> Any person aggrieved by any act or decision of the Liquidator may apply to the Court which may confirm, reverse or modify the act or decision complained of and make such order as it thinks just.

If the contributory is seeking leave or sanction to bring the action in the name of the company, then it is to be noted that only the court (and not the liquidator) has the authority and power to give such leave or sanction. The liquidator has no such authority or power. The law on this point is well settled. Andrew R. Keny in *"McPherson The Law of Company Liquidation"* 4th edn, at p. 258 states as follows:

> If a Liquidator either believes that an action is too risky to pursue or he or she does not have sufficient funds, then despite the fact that the general principle is that when a company is in liquidation the person in whom the authority to bring proceedings on the part of the company is vested is the liquidator, a creditor or member who thinks that the action has merit and should be prosecuted, may apply to the Court and seek either permission to proceed on behalf of the company or an order directing the Liquidator, pursuant to s. 477(6), to proceed. The Courts have power to accede to the former type of application under their general powers, the use of such

power having a long lineage and being supported by high authority. If the former application is made, then the Applicant must be ready to accept all of the risks connected with the action. If this is the case, then it is of no moment that the action would not be beneficial for the creditors and members of the company. The only real barriers to proceeding is, as with all actions, namely that the action must not be vexatious or oppressive.

In deciding whether or not to grant leave to a member to institute proceedings in the name of the company in liquidation, Courts are to apply the same principles which are applied when hearing an application under s. 471B for leave to institute proceedings against a company in liquidation. If leave is granted, then it may be subject to conditions.

The same principle was also followed by the Full Court of South Australia in *Russell & Anor v. Westpac Banking & Ors* [1994] 12 ACLC 278 at p. 279, where it was held:

When the company is in liquidation, the person to whom is vested the authority to institute proceedings is the Liquidator ... There is power, however, in the Court to authorise other persons to conduct litigation in the name of the company; *Cape Breton Co. v. Fenn* [1881] 17 Ch D 198; *Aliprandi v. Griffith Vintners Pty. Ltd. (in liq) & Anor* [1991] 9 ACLC 1530 ...

It is also to be noted that only a creditor or contributory of the company is eligible to initiate an action, using the name of the company.

In *Fargro Ltd. v. Godproy & Ors* [1986] 3 All ER 279 at p. 281 it was held by Walton J of the Chancery Division that:

But who are the persons who can be authorised to take these steps? In my opinion the creditors and the contributories only, nor under any special clause of the Act, but because they are the persons who, under the terms of the Act, can intervene if they are advised that the Liquidator does not properly do his duty.

It was also held in that case *(Fargro Ltd.)* that:

A minority shareholder's action will not lie if a company is in liquidation. The appropriate procedure in such a situation is for the liquidator to bring the action on behalf of the company or, if he refuses to do so, a contributory may apply to the Court for an order authorising him to bring the action in the company's name or compelling the Liquidator to do so on such terms as to indemnity as the Court considers appropriate.

Whether the liquidator himself initiates the action in the name of the company, or the right to use the name is given by the court to the 'would-be-plaintiff' ie, either a creditor or contributory, some form of security and/or indemnity on terms and conditions ought to be provided or ordered by the court. This point was expressed by Walton J in *Fargro* case at p. 281:

> Doubtless, as in virtually all cases, the Liquidator will require an indemnity from the persons who wish to set the company in motion against all the costs, including, of course, the costs of the defendants, which he may have to incur in bringing that action. The Liquidator may ask for unreasonable terms or, on the other hand, the Liquidator may be unwilling to bring the action, and, under those circumstances, it is always possible for the shareholders who wish the action to be brought to go to the Court asking for an order, either that the Liquidator bring the action, in the name of the company or, more usually, that they are given the right to bring the action in the name of the company, of course, against usual type of indemnity which will, if there is any difficulty about the matter, be settled by the Court. And I think that this has been the practice and procedure for a very long time indeed.

And at p. 283 it was further held:

> ... the procedure which is adopted is either that the Liquidator sues in the name of the company, of course, against suitable indemnities, or that, against suitable indemnities, the would-be-plaintiff is allowed himself/herself/itself to sue in the name of the company ...

In another case, *Aliprandi v. Griffith Vintners Pty. Ltd. (in liquidation) & Anor* [1991] 6 ACSR 250 at p. 254, McLelland J, in granting leave to a contributory of a company (in liquidation) to use the name of the company as a plaintiff in an action, made the following ruling:

> In my view an order should be made authorising Mr. Aliprandi, at his expense and risk as to costs, to use the name of the company as Plaintiff or co-Plaintiff in proceedings to be commenced against Peter Hedge for compensation or damages in respect of alleged breaches of his duty to the company as receiver and manager of property of the company. As a formal matter this should be conditional upon Mr. Aliprandi delivering to the Liquidator against any costs charges or expenses (including the Liquidator's remuneration) in connection with or arising out of any such proceedings together with a payment of $5000 to be held by the Liquidator and to be applied to any such costs charges or expenses if and when incurred, and subject thereto to be refunded to Mr. Aliprandi. This amount ought to be more than sufficient to cover administrative costs of the winding-up

> incidental to the contemplated proceedings. The Liquidator will be entitled to be informed from time to time as to the progress of the proceedings, and their conclusion may necessitate further work to be done on his part. This amount is not of course intended to include any costs of the proceedings themselves, and it will be the responsibility of Mr. Aliprandi and not the Liquidator to fund the conduct of the proceedings, and to provide security for the costs of the Defendant if any such security is required in the proceedings.

In another case, *Eros Cinema Pty. Ltd. v. Michael Assad Nassar* [1996] 14 ACLC 1374, the Supreme Court of New South Wales, in allowing a contributory of a company (in liquidation) at his own expense and risk as to costs, to use the name of the company to commence proceedings made the following consequential order namely:

> The order should be conditional upon Mr. Kontorinakis delivering to the Liquidator a deed duly executed by him indemnifying the company against any costs, charges or expenses in connection with or arising out of any such proceedings and it would be the responsibility of Mr. Kontorinakis to guard the conduct of the proceedings in the name of the company.

When determining whether to give leave to a creditor or contributory to institute proceedings in the name of a company in liquidation, the court should apply the same principles as applied to an application to institute proceedings against the company in liquidation (see: *Eros Cinema Pte. Ltd.* case). Those principles required the applicant to produce evidence that is sufficient to establish that its claim had a solid foundation and that gives rise to a serious question to be tried (see: *Vagrand Pty. Ltd. v. Fielding* [1993] 11 ACLC 411). This did not require the applicant at that stage to produce evidence sufficient to establish affirmatively that the proposed proceedings would necessarily be successful. The court is entitled to infer from the available evidence, at the stage of the application, that additional relevant evidence would likely to be or might be available from other sources during the trial of the proposed proceedings.

The burden of the applicant in this type of application is to satisfy the court that there are issues to be tried in the proposed proceedings. In this context, Simos J in *Eros Cinema Pte. Ltd.* had assimilated the test laid down in *Vagrand Pty. Ltd. (in Liquidation)* as follows:

> The test which has actually been applied is akin to that now used in considering whether interlocutory relief should be granted: 'a serious issue to be tried' See *Castlemaine Toohey Ltd. v. South Australia* [1986] 151 CLR 148 at 153 ...

In another case, Lloyd – *Owen v. Bull* [1936] 4 DLR 273, the Privy Council had held the following:

> A judge in winding up is the custodian of the interest of every class affected by the liquidation. It is his duty ... to see to it that all assets of the company are brought into the winding-up. In authorising proceedings, especially if they may or will involve some drain upon the assets, he must satisfy himself as to their probable success; where ... they involve no possible charge on assets, he will nevertheless be careful to see that any action taken in the company's name under his authority is not vexatious or merely oppressive.

In *Aliprandi* at p. 252, (which was also cited in *Eros Cinema*), McLelland J adopted the same principle and had quoted the above principle as "the proper approach of the court in such an application."

In the present case the court is satisfied that the evidence adduced by the applicant *via* his affidavits in support of the application and exhibits attached thereto established that the respondent company has a sufficiently good cause of action for breach of contract against HSBC. At lease the applicant has established that there are serious questions to be tried as between the respondent company and HSBC. The basis of the respondent company's proposed claim against HSBC as set out in paras. 13-21 of the applicant's first affidavit in support of the application has established that on or about 1994 he had various discussions with the C.P. Longley, the then Deputy Chairman and Chief Executive Officer of HSBC on a potential mixed development project in Jalan Barat, Lot 726-727, Section 8 Selangor comprising a banking, office and commercial complex. HSBC had expressed it's interest in the project and purchase of the entire office tower to be called the "HSBC Tower" to house the activities of it's branch at Petaling Jaya. The development of the "HSBC Tower" was to be carried out based on the specifications and agreements of HSBC. The respondent company was incorporated initially under the name of Jupiter Synergy Sdn. Bhd. in 1994 and the company was the vehicle used for the purpose of the said development project. The name of the respondent company was subsequently changed to the present name ie, Palmshine Plaza Sdn. Bhd. On 13 March 1995, the respondent company received a letter from Mr. C.P. Longley the then Deputy Chairman and Chief Executive Officer of HSBC confirming that they had received approval in principle from Bank Negara Malaysia to relocate their branch to the said development at 23-

23A, Section 8 Petaling Jaya and the Board of HSBC had endorsed the project. The respondent company then appointed Abric Project Management Sdn. Bhd. (the petitioner in the winding-up proceedings where the respondent company was wound-up) to be the project manager. For the purpose of planning and design of the project the said Abric Project Management (the petitioner) worked in co-ordination with the property manager of HSBC. The applicant was advised that approval in principle from the local authorities for the said project were obtained in late 1996.

By a letter dated 21 February 1997, HSBC through its Deputy Chairman and Chief Executive Officer Mr. T. W. O'Brian confirmed their acceptance of the respondent company's offer to sell 147,958 net square feet of office space with 240 car parks at a price of RM83.5 million with an additional RM3 million if the lease is extended to 99 years. The total project was to be financed by HSBC and pursuant thereto, HSBC financed the purchase of the land by the respondent company. The applicant claimed that the said contract has been terminated by HSBC, to be inferred from the conduct of HSBC when it joined in support of the winding-up petition against the respondent company filed by the petitioner (Abric Project Management Sdn. Bhd.) The petitioner's claim against the respondent company is for the amount of RM2 million represents the value of work done by the petitioner on behalf of the respondent company in the course of the development project and approval thereof.

The above evidence adduced by the applicant satisfied the court that the proposed claim to be instituted in the name of the respondent company against HSBC is not vexatious or oppressive. The evidence established serious issues to be tried.

Conclusion

Based on the facts of the present case and the established law on the issues as well as the power of the court under s. 279 of the Companies Act 1965, the court is satisfied that the applicant has made out a case under the present application. Therefore, the court is making an order that:

1. The applicant is authorised to commence proceedings by himself against HSBC in the name of the respondent company in respect of the proposed proceedings subject to the following terms and conditions:

(a) The applicant is to take full charge and conduct of and responsibility for the proposed proceedings, which includes the appointment of solicitors of his choice to have conduct of the proposed proceedings for and on behalf of the company;

(b) Any sums received and/or recovered through the proposed proceedings are to be delivered to Mr. Lim Tian Huat as liquidator of the company or otherwise to the liquidator of the company for the time being for redistribution to the creditors and contributories of the company in accordance with the legal principles and provisions governing the same in the context of company liquidations;

(c) The applicant shall be fully responsible for the funding of the proposed proceedings and any and all costs and liabilities arising thereon or incurred in connection therewith in the name of the company, which includes and shall not be limited to, the payment of all costs ordered to be paid by the court to any party or parties to the proposed proceedings, and the satisfaction of any order of the court which may be made in the proposed proceedings or in connection therewith or arising therefrom whether in the proposed proceedings or otherwise, including without limitation any orders for security for costs which may be ordered against the company and/or the liquidator of the company which expression shall include any subsequent liquidator of the company for the time being;

(d) The solicitors engaged by the applicant to take conduct of the proposed proceedings must be prepared to and will issue a written undertaking that they shall not later claim against the company and/or liquidator for any professional fees and/or disbursements which may in the future become due and owing to them by the company or otherwise in connection with the conduct of the proposed proceedings for any reason whatsoever;

(e) The applicant shall execute a written indemnity in favour of the company and/or the liquidator agreeing to indemnify the company and/or the liquidator against any and all costs, expenses, liabilities, damages, order for costs and/or other claims, which may accrue to the company and/or the liquidator by reason of or in connection with, whether directly and/or indirectly, the commencement and prosecution of the proposed proceedings by the applicant in the name of the company pursuant to the order granted by the court.

(f) The applicant shall deposit a sum of RM100,000 into a joint account of Messrs Ranjit Ooi & Robert Low as the solicitors for the liquidator of the company and Messrs Xavier, Norhaslinda & Associates as solicitors for the applicant as security for the indemnity above mentioned, pending the final determination and/or disposal of the proposed proceedings. This said security shall be used to offset the costs and expenses to which the company and/or the liquidator may be exposed during the course of the proposed proceedings;

(g) From time to time, where it appears necessary that the said security should be increased, the liquidator shall notify the applicant to place a further amount with the liquidator's solicitors;

(h) The liquidator shall not in any manner whatsoever be responsible for the proposed proceedings and shall no be required under any circumstances to be involved therein including without limitation providing evidence therefore, whether by of affidavit evidence or otherwise howsoever;

(i) The proposed proceedings shall be the intended proceedings against HSBC Bank Malaysia Berhad and any other possible causes of action arising out of the project or transaction including and not limited to HSBC Bank Malaysia Berhad.